Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

NO. 77-1527

LUIS J. LAJE,
Petitioner

vs.

R. E. THOMASON GENERAL HOSPITAL,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR PETITIONER

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I.

RESPONDENT'S RECITAL OF THE NAMES OF PHYSICIANS WHO TESTIFIED BEFORE THE BOARD OF MANAGERS DOES NOT CHANGE THE LAYPERSON COMPOSITION OF THE DECISIONMAKER.

Testimony by other physicians can not confer medical expertise upon the layperson Board. The fact that there was medical testimony does not correct this due process deficiency nor does it bring the Fifth Circuit's opinion in accord with Klinge v. Lutheran Charities Association of Saint Louis, 523 F.2d 56, 60 (8th Cir. 1975).

II.

RESPONDENT HAS MISSTATED PETITIONER'S POINT ON THE LEGAL RELEVANCE OF A STATISTICAL EVALUATION OF THE EVIDENCE.

The conflict with Rizzo v. Goode, 423 U.S. 362, 374 (1976), is found in the Fifth Circuit's express repudiation of the statistical evaluation of the evidence. (Pet. App. B-7). To reiterate:

> We have repeatedly approved of the use of statistical proof . . . We caution only that statistics are not irrefutable; they come in infinite variety and, like any other evidence they may be rebutted. In short, their usefulness depends upon all of the surrounding facts and circumstances.

International Brotherhood of Teamsters v. United States, ___ U.S.___, 97 S. Ct. 1843, 1856-1857 (1977).

Considering the conflicts in the testimony and the hasty review of the hand-picked patient histories, a statistical evaluation of the number of cases and their manner of selection was properly relied upon by the trial court and should not have been totally rejected by the Fifth Circuit.

The hospital obscures the usefulness of statistics by asserting that the Petitioner wishes to impose a mathematical standard to determine medical competence. That is not the Petitioner's position, nor has it been the position of this Court.

III.

RESPONDENT'S ANALYSIS OF THE FINDING OF INSUBORDINATION LEADS TO THE CONCLUSION THAT THE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY.

Dr. Laje was not charged with an inability to work well with others; he was charged with insubordination. Insubordination means a failure to follow orders given by a superior not a failure to get along with co-workers. Respondent's effort to show a negative working relationship points out that the evidence under the insubordination point was so patently insufficient that the hospital has had to search for evidence of something else. Their search to reasonably justify their action continues at this judicial level.

This analysis by the Respondent supports the arbitrariness of the hospital's action. Dr. Laje was denied the reinstatement of staff privileges for reasons other than incompetence or insubordination; the Petitioner was denied reinstatement of these privileges because of Dr. Maurice Marks' personal dislike for Dr. Laje. A state action premised on the capricious whim of one individual is impermissable:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.

Yick Wo v. Hopkins, 118 U.S. 356, 369-370 (1886).

CONCLUSION

This petition presents the Court with the frequently litigated and inconsistently decided issue of when and how due process intervenes in denials of hospital privileges at public hospitals. In the same vein, the petition raises an important jurisdictional question–should the District Courts exercise their original jurisdiction conferred by 42 U.S.C. § 1983 in cases of this nature. The decision of the Fifth Circuit in this case conflicts with decisions of the Eighth Circuit and this Honorable Court. In order to deal with the important questions presented and to resolve the judicial conflicts, this Court should grant a writ of certiorari to the United States Court of Appeals for theFifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Reply to Respondent's Brief in Opposition has been mailed to the following attorneys of record on this the 31st day of May, 1978: Mr. Larry Anderson, 3100 Fidelity Union Tower Building, Dallas, Texas 75201; and Mr. James Kirby Read, 604 Myrtle Avenue, El Paso, Texas, 79901.

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